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State of New Hampshire
OFFICE OF ATTORNEY GENERAL

February 12, 195[illegible]

Attorney General

Eastern N.H. Turnpike

File

George F. Nelson, Esq.,
Assistant Attorney General

Turnpikes

Frank D. Merrill, Commissioner,
Department of Public Works and Highways

Dear General Merrill:

In reply to your letter of January 25, 1954, you are respectfully advised that it is my opinion that you have the authority under existing law to report to the Governor and Council that a service road should be laid out in the area concerned in Portsmouth, New Hampshire. However, in this connection it is also believed that the savings-to-the-state relationship must be preserved or at least equalized, i.e., that the cost of the service road cannot exceed the commission's awards for damages. As I understand it, at the present time this is $90,000.

Also, there would appear to be no authority to warrant the conveyance of the service road to the City of Portsmouth without a proper consideration, and this again will depend upon the decision of the Governor and Council upon a subsequent representation from you to them on this point.

In making its awards, the commission has no present authority to bind the state to convey to the City of Portsmouth such a service road when completed nor to make an award of $1.00 plus service road, unless all land owners agree. Where, as here, less than half of the land owners have agreed and there is outstanding the danger to the state of a substantial jury verdict awarding damages to others over and above the cost of construction of any service road, it seems doubtful that the basic conditions for application of any savings-to-the-state formula can be found to exist at the present time.

In simple language, if all the land owners affected want to agree to a nominal award plus a service road you have the power to do this through Governor and Council, but so long as any substantial interest in a land owner (or land owners) affected opposes this solution, it would appear that the only course is to proceed with the direct layout of the limited access highway in the normal course of events, with appropriate judicial review of commission awards in the normal course of business, and forget the idea of a service road.

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The foregoing attempts to summarize the conclusions reached, and the following paragraphs set forth in detail some of the reasoning and citations in support of these conclusions.

Your letter of January 25 raises some complex considerations. Taken up in the order in which they appear in that letter, we advise as follows:

1. You have referred to having been personally called into legislative committee executive sessions when service areas were under consideration and that it is very clear to you that the Legislature did not desire to approve service areas. Therefore, first, it is important to consider whether the proposed service road adjacent to the proposed limited access highway, both within the limits of already required highway right of way, violates the legislative intent. The highway, by Laws of 1953, chapter 237, section 9, is designated as a limited access highway as defined in Revised Laws, chapter 90, as inserted by Laws of 1945, chapter 183, Part 7. Said Part 7, section 1, defines a limited access highway. No limitation of your authority to deal with such limited access highways as provided in the other sections of said Part 7 and no limitation of the application of general highway law to the turnpikes authorized by chapters 237 and 238 of the Laws of 1953 is expressed in either act except as to section 8 of said Part 7. In short, it does not appear from the text of these acts that the Legislature intended any limitation of your powers conferred by said Part 7 of chapter 183 of Laws of 1945 or other acts except for the provisions of section 8 of said Part 7 relating to commercial enterprises or activities. Said Part 7, section 3, expressly authorizes you to "divide and separate any limited access facility into separate roadways by the construction of raised curbings, central dividing sections, or other physical separations, . . .", or by section 5 "to designate as local service roads and streets any existing road, street or highway, and to exercise jurisdiction over service roads in the same manner" as you are authorized over limited access facilities if in your opinion such local service roads are necessary or desirable. The provisions of chapter 237, section 9, and chapter 238, section 8, of Laws of 1953 that section 8 of said Part 7, chapter 183, Laws of 1945, shall not apply to "existing facilities on highways, not now restricted as to access, used as toll-free sections of the turnpike" purport to give you discretion to permit existing business enterprises

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having access to the present paved highway to continue in their present locations with right of access to the new toll-free sections of the turnpikes when completed. As expressed by the Court in Wiseman v. State, _____ N.H._____ (decided December 21, 1953) such legislative exception of an "existing facility" from the limited access restriction is "not artistically phrased" but discloses an intent to exempt an existing established enterprise and not the lot which might be used for such enterprise. It will be noted that in the Wiseman case rights of access, air, view and light had already been conveyed to the State and that decision does not expressly authorize the legislative distinction.

Whatever may have been thought by committee members in their initial consideration of the legislation, expression of such restrictive intent as you report is not apparent in the legislation as enacted. On the contrary, although section 8 of said Part 7 was directly made inapplicable, your powers and duties under the remaining sections of said Part 7 were left untouched.

2. The commission's jurisdiction in this matter is governed by the provisions of section 2 of said Part 7 and it will be noted that it is required that they "shall lay out the remainder of such facility, service roads, or alteration thereof, assess the damages sustained by each owner of land or property taken". . . and "may acquire private or public property and property rights for such facility and service roads, including rights of access, air, view and light, by gift, devise, purchase or condemnation in the same manner" in fee simple and "in its discretion may acquire an entire lot, block, or tract of land, if by so doing the interests of the public will be best served."

Most of the existing right of way was acquired except for rights of access, air, view and light, in 1949, by commission appointed by Governor and Council July 27, 1949, which commission filed its return with the Secretary of State October 19, 1949.

3. Under the law of New Hampshire in the ascertainment of the market value of the landowner's rights taken or land taken over which a highway is laid out, the landowner is entitled to have it appraised

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for the most profitable or advantageous use to which it could be put at the time of taking and the measure of the landowner's damages is the difference between the market value of his entire tract of land so affected after the highway was laid out and constructed and what it would have been worth if the highway had never been established. This is firmly established in the law. Davis v. State, 94 N.H. 321.

Whether the suggestion of a $125,000 service road in lieu of cash award may be made depends upon several factors, one of which is whether or not the benefit so furnished is directly related to and equivalent to the actual land damages. A $90,000 figure for damages is not so related to a $125,000 construction cost. It is assumed that the formula expressed in the preceding paragraph is the one used by the commission.

In the past many settlements with landowners have hinged upon such matters as grading of slopes, construction of retaining walls and moving of buildings by the state (because your department could do these things at less than the quoted estimated cost to the landowner) rather than upon strictly cash awards. In practically all cases this has resulted in net savings to the state. Construction of such a highway as is proposed would be the same type of substitution of services and other consideration for cash but the figures quoted do not bear the same savings-to-the-state relationship. It is believed that the commission cannot exceed the actual-damages figure. Their opinion as to damages is not now open to question if it represents their free, honest judgment applied with regard to the rule of law above cited.

There must be an adjudication that public necessity and convenience require this service road as a prerequisite to its validity. It cannot be laid out merely to avoid the expense of future litigation and not because there is a lawful occasion for its construction. The mere fact that someone is willing to pay the expense of building a road, in cash or by waiver of a cash award, is not proof that public necessity does not require the road and the presumption is that the proceedings of the commission or Governor and Council in laying out such a road, in the absence of evidence to the contrary, have been regular, involving necessarily a determination of the question of the public good.

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The commission has no authority to bind the state to convey such service road, when completed to any city or town wherein it is situated. The area involved is not an area acquired by the present commission, except for rights of access, air, view and light appurtenant thereto, but is an area acquired by the 1949 commission and the provisions of section 2, Part 7, relative to sale of a part are not applicable thereto. Such sale or disposition would require disposal of the area and road by the Governor and Council upon recommendation of the Commissioner of Public Works and Highways in accordance with Revised Laws, chapter 27, section 34.

The procedure for discontinuance of relocated portions of Class I and Class II highways as set forth in Revised Laws, chapter 290, as inserted by Laws of 1945, chapter 188, Part 8, could permit a future reversion of this service road to the city or town if initially constructed as part of the original highway now being altered. However, we doubt that the provisions of this section of the law are sufficiently broad to authorize construction by the state of a road which the state has "no further occasion to use". It is our opinion that, if authorized to be laid out and constructed as necessary to safety on the toll road freeway, this service road must be contemplated as a continuing part of the original facility.

Part 7, section 7 of said chapter 188, requires any limited access facility to be maintained with state or federal funds or both, but does not expressly require that service roads or subsequent alterations of limited access facilities be so maintained. If this road were a service road properly laid out, it would be within the province of the Governor and Council to convey it to the city or town for proper consideration upon your recommendation if it appeared to be within the scope of public necessity and convenience. Proper legal consideration for the transfer is an essential prerequisite; otherwise the state must maintain it as part of the original facility.

4. The question of an award to the City of Portsmouth is moot. The commission's return made no such award.

Your authority to determine the location of the toll road is comprehensive enough to direct layout of this proposed service

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road if you determine that there is occasion for the layout and construction of such a road and the Governor and Council determine upon hearing that there is occasion for so laying out this limited access facility including this service road. In such case the need for the road should be independent of consideration of damage awards, although, obviously, its construction, at least as to the 39% of the owners agreeable to the nominal award plus service road, would affect damage awards.

If such Governor and Council action is taken upon your recommendation and, after hearing, the project for construction is approved, and the commission is directed to assess damages in accordance with pre-determined Governor and Council determination of public necessity and convenience, the project would appear to be within the scope of existing law. Without such prior determination of necessity of such a road, the commission cannot create it.

Accordingly, the agreements purporting to award one dollar plus a service road are void and the state has not acted or contracted with the landowners who derive no special rights, by estoppel or otherwise, to such service road.

There appears to have been a sincere effort on the part of the commission to minimize injury to abutting landowners and to preserve as much access to abutters as possible in view of requirements of safety of the traveling public on the proposed limited access free way of the toll road. Because of the cost of such road, as compared to cost of purchasing access rights, their plan is beyond their powers.

Accordingly, unless you conceive it your duty to lay out and construct this service road as necessary to the toll road project and Governor and Council approval is added, the layout of this road should be recommitted to the commission to lay the same out without regard to such service road, assessing proper damages for rights taken and filing of amended return, all within the scope of their statutory powers.

Very truly yours,

George F. Nelson
Assistant Attorney General

CC: Governor Gregg
[illegible] Right of Way Division
John O. Morton
Turnpike Division